

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN  
FRANCISCO,

Plaintiff,

v.

FACTORY MUTUAL INSURANCE  
COMPANY, et al.,

Defendants.

No. C 04-5307 PJH

**ORDER DENYING MOTION TO  
DISMISS COUNTERCLAIMS AND  
MOTION TO STRIKE**

AND RELATED COUNTERCLAIMS

The motion of cross-defendant City and County of San Francisco (“CCSF”) for an order dismissing Counts 4 and 5 of defendant and cross-complainant Bombardier Transportation (Holdings) USA, Inc. (“Bombardier”), for failure to state a claim, and alternative motion to strike, came on for hearing before this court on March 29, 2006. CCSF appeared by its counsel Kris A. Cox, and Bombardier appeared by its counsel Otto Becker. Having read the parties’ papers and carefully considered their arguments, and good cause appearing, the court hereby DENIES the motion as follows and for the reasons stated at the hearing.

Based on the representation of Bombardier’s counsel at the hearing that Bombardier’s fourth and fifth counterclaims are contract claims, not tort claims, and the representation that Bombardier does not seek tort damages in its counterclaims, but rather

1 simply seeks to assert an alternative theory of contract recovery, the court finds that CCSF  
2 has not established that the fourth and fifth counterclaims fail to state a claim, and has not  
3 established that those counterclaims should be stricken.

4  
5 **IT IS SO ORDERED.**

6 Dated: March 30, 2006



---

PHYLLIS J. HAMILTON  
United States District Judge